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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

CHRIS ALLEN MONTGOMERY,

Petitioner

vs.

STATE OF ALABAMA,

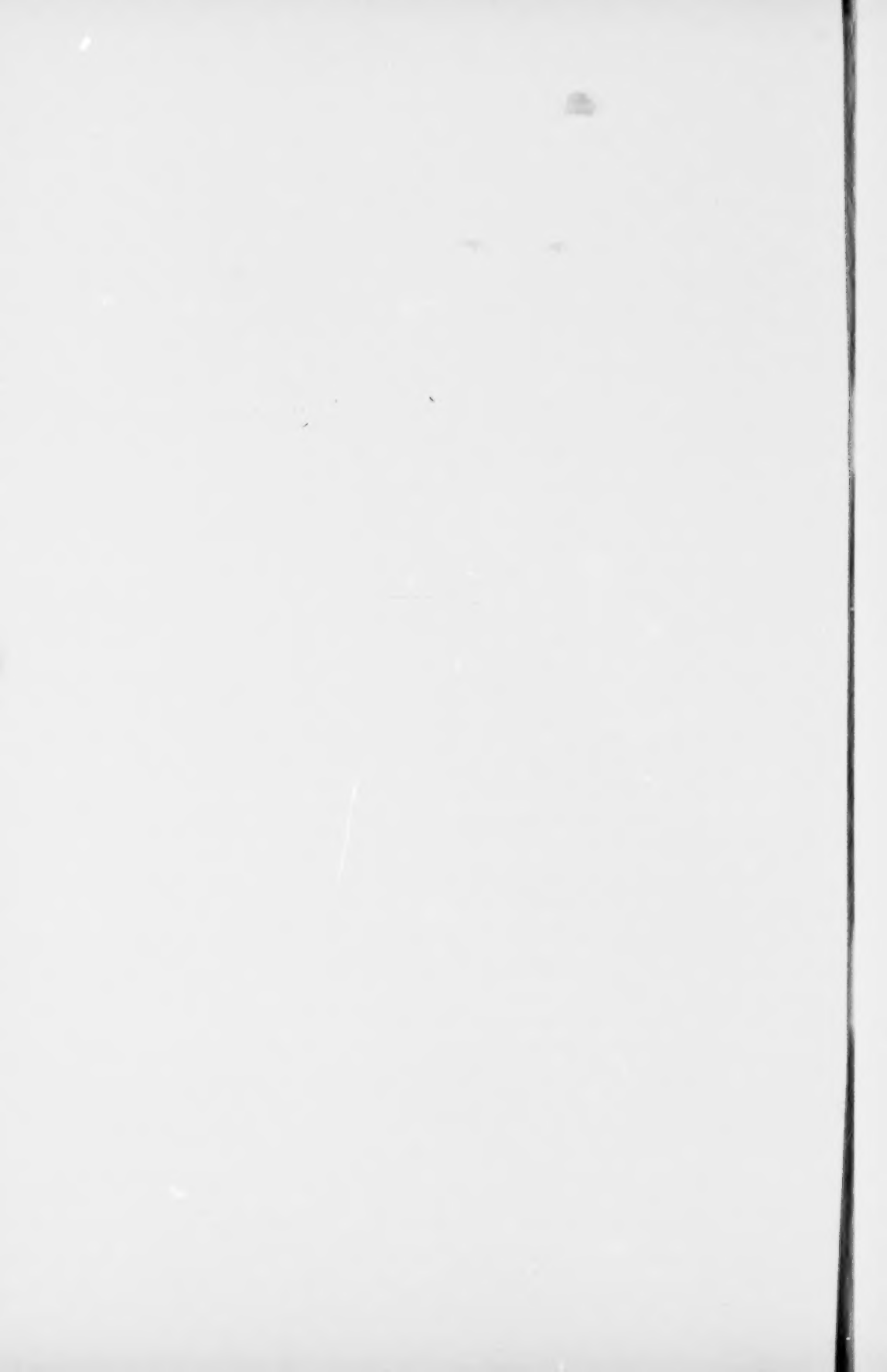
Respondent

PETITION FOR A WRIT OF
CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF ALABAMA

BRIEF OF PETITIONER

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ATTORNEY'S FOR PETITIONER



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CHRIS ALLEN MONTGOMERY,

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STATE OF ALABAMA,

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QUESTIONS PRESENTED

1. Were the Petitioner's due process rights violated when an alleged prior Federal conviction was used to enhance his punishment under the Alabama Habitual Offender Act although the conviction would not have been a felony under Alabama law?

2. Is the Alabama Habitual Felony Offender Act in compliance with the guidelines set forth by this Court in Solem v. Helm, ____ U.S. ____, 103 S.Ct. ____, 77 L.Ed.2d 657 (1983), which established the precepts to follow in sentencing under recidivist laws?

PARTIES

In the Circuit Court of Cullman County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Respondent herein and Chris Allen Montgomery, who is the Petitioner herein.

The matters at issue here were first raised in the Circuit Court of Cullman County, Alabama, and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction is not as yet reported but will be reported as follow:

Montgomery v. State, _____ So.
2d _____ (Cr.App.Ala. 1983)

A copy of the same is submitted in Appendix "A" to this petition.

The order of the Alabama Supreme Court denying the Petitioner's writ of certiorari is not as yet reported as follows:

Ex Parte: Chris Allen Montgomery
In re: Montgomery v. State,
_____ So.2d _____ (S.Ct.Ala, 1983)

A copy of the same is submitted in Appendix "B" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama wherein the writ of certiorari was denied was issued on March 2, 1983, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVLOVED

The Constitutional provisions involved in Petitioner's writ include the Fifth Amendment to the Constitution of the United States, the Eighth Amendment to the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States. A copy of these amendments are submitted as Appendix "C" to this petition.

STATUTORY PROVISIONS INVOLVED

At issue in this case is the constitutionality of § 13A-5-9, Code of Alabama, 1975, regarding punishment for habitual felony offenders and Rule 6 (b)(3)(iv) of the Alabama Rules of Criminal Procedure, Temporary Rules. A copy of these statutes are submitted as Appendix "D" to this petition.

STATEMENT OF THE CASE AND FACTS

I

The Petitioner was tried with two co-defendants on charges of first degree robbery, and all were convicted. A sentencing hearing was held under the Alabama Habitual Offender Act, wherein each were sentenced to life without parole. A consolidated appeal followed to the Alabama Court of Criminal Appeals.

The basis of Petitioner's appeal was two-pronged. Initially, the Petitioner raised the constitutionality of § 13A-5-9, Code of Alabama, 1975, the habitual felony offender act, contending that it violated his rights under the Eighth Amendment to the Constitution of the United States. Secondly, the Petitioner alleged that the sentencing hearing held under the habitual offender act

was improper in that a prior Federal conviction was erroneously used to enhance his punishment and was contrary to Alabama law.

On November 29, 1983, the Court of Criminal Appeals of Alabama affirmed the conviction of the Circuit Court, the opinion of which is submitted as Appendix "A". An application for rehearing filed in the Court of Criminal Appeals raising the same issues was denied without opinion on January 10, 1984.

Mr. Montgomery then petitioned the Supreme Court of Alabama for a writ of certiorari alleging substantially the same issues. The petition was denied without opinion on March 2, 1984.

II

The petition is based on the following facts:

The Petitioner and two other men were arrested for the robbery of a grocery store. All three men were armed, but there was no violence. The owner of the store and a customer were bound, but the owner was able to call the police and give a description of the truck they left in.

The three men, including the Petitioner, were apprehended minutes later and brought back to the store where they were identified by the owner and the customer.

SUMMARY OF THE ARGUMENT

The statute under which the petitioner was sentenced is unconstitutional in that it violates the Eighth Amendment rights prohibiting cruel and unusual punishment. The Alabama statute totally ignores the principle of proportionality so protected by this Honorable Court and mandates fixed punishment for various classifications of felony offenses. No guidelines are used by the Alabama Courts to aid them in establishing the appropriate punishment for the specific offense.

In order to invoke the recidivist statute in Alabama, it must be shown that the prior conviction used for enhancement of the sentence was either a felony under Alabama law or if from another jurisdiction would have "constituted" a felony under Alabama law. One of the prior convictions

intorduced at the Petitioner's sentencing hearing was a violation of a Federal law, failure to register a firearm with the National Firearms Registration and Transfer Record, and was not a felony under Alabama law. The use of the Federal conviction under the recidivist statute was a violation of the petitioner's due process rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

ARGUMENT

I

The petitioner in the case at bar was sentenced under the provisions of the Alabama Habitual Felony Offender Act, §13A-5-9, Code of Alabama, 1975, to a term of life imprisonment without parole for the offense of robbery, a Class A felony. At the time of the sentencing the Alabama courts were without guidelines to follow in imposing prison terms under the habitual offender act. The only assistance given the sentencing courts were the range of punishment and the mandatory degrees of enhancement for repeat offenders. This area has since been somewhat clarified by a decision of this Honorable Court issued June 28, 1983, Solem v. Helm, __ U.S. __, 103 S.Ct. __, 77 L.Ed.2d 657 (1983), wherein it was determined that in certain

cases the punishment imposed by a sentencing judge is disproportionate to the crime and is a violation of the Eighth Amendment's prohibition of cruel and unusual punishment.

This Court set forth criteria to guide the state courts in determining the sentence to impose. They are:

1. The gravity of the offenses and the harshness of the penalty.
2. A comparison of the sentence imposed on other criminals in the same jurisdiction.
3. A comparison of the sentences imposed for commission of the same crime in other jurisdictions.

When Mr. Montgomery was sentenced there was only one criteria for the trial judge § 13A-5-9(c)(3), Code of Alabama 1975, which mandates a sentence of life in prison without parole for conviction of a Class A felony after having been previously

convicted of any three felonies. No
discretion is given to the judge, he was
required according to the law to impose
this sentence regardless of the circum-
stances involved in the particular cases.
In effect, the legislature has taken it
upon themselves to be a moral judge and
jury and to arbitrarily mandate that a
person who has been convicted of any three
felonies is an outcast and has no hope
of possible rehabilitation, therefore,
they should be consigned to the peniten-
tiaries of this state forever. This is
an official declaration by a law making
body that an individual can no longer be
beneficial to society because of his past
transgressions. What could be a more
cruel and unusual punishment to impose
on a human being ? See Judge Frank M.
Johnson's dissent in Terrebanne v. Blackburn,

646 F.2d 997 (5th Cir. 1981) This Court addressed this issue in Helm when they said that South Dakota had "rejected rehabilitation as a goal of the criminal justice system." It is apparent that this has also been done in our state.

Without applying the habitual offender act a class A felony in Alabama would normally carry a sentence of ten years to 99 years with possibility of parole, or if a firearm or deadly weapon was used 20 years to life, with the possibility of parole. However, with three prior felonies of any degree (A, B or C), a sentence of life without parole would be mandated on the conviction of a class A felony. If a person is convicted of producing obscene materials displaying minors (Class A) and has three prior convictions for fraudulent use of a credit card (Class C) then he would

also be sentenced to life without parole. In the same vein, a person convicted of murder (Class A) with two prior felonies is to be sentenced to life or any term not less than 99 years, but he does have the possibility of parole. His two priors could have been two murder convictions (Class A) or any two class C felonies, such as installing eavesdropping devices or setting off false alarms.

The requirements of the Alabama Habitual Offender Act clearly shows that in many instances the punishment is indeed disproportionate to the crime. In the instant case the appellant was convicted of a robbery where there was no violence committed, and he has been sentenced to life without parole. However, as the prior example shows, a person could conceivably

take the lives of two people and the third murder conviction would only result in a life sentence with the possibility of parole.

It is a travesty for this Court or the courts of the state of Alabama to allow a man to be arbitrarily sentenced to a prison term without the proper sentencing procedures being followed. The Alabama recidivist act is not in compliance with the requirements set forth by this Court in Solem v. Helm, supra. The legislature statute should be brought into conformity with the mandates of this our highest Court as it seeks to interpret our fundamental and basic rights as a citizen of the United States. To properly protect the rights of Mr. Montgomery as set forth in the Eighth Amendment, the criteria for determining the proportionality of the punishment must be

used. The Alabama statute by not adhering to these standards has violated the petitioner's inherent rights under the Eighth Amendment to the Constitution of the United States.

II

The Petitioner further proposes to this Honorable Court that error resulted when the trial court used a prior Federal conviction to enhance his punishment under the habitual offender act.

The Federal conviction that made the of this argument is a violation of 26 USC 5861 (d):

" It shall be unlawful for any person to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."

Mr. Montgomery was convicted for possession of a 20 gauge single barrell shotgun which had not been so registered.

Rule 6 (b)(3)(iv) of the Alabama Rules of Criminal Procedure, Temporary Rules provides that:

" Any conviction in any jurisdiction including Alabama, shall be considered and determined to be a felony conviction if the conduct made the basis of that conviction constitutes a felony under Act 607, §130 (4), Acts of Alabama 1977, p. 812 (§13A-1-2 (4), Alabama Criminal Code, or would have constituted a felony under that section had the conduct taken place in Alabama on or after January 1, 1980."

It is proposition of the Petitioner that the possession of a firearm which has not been registered in the National Firearms Registration and Transfer Record does not constitute a crime under Alabama law and therefore cannot be considered a prior

felony for sentencing purposes.

In Carter v. State, 420 So.2d 292 (Ala.Cr.App. 1982), the defendant was sentenced under the habitual offender act and one of the prior convictions presented to the sentencing court was a conviction under a two count Federal indictment charging in count one the possession of a check stolen out of the United States mail and count two of unlawfully uttering and publishing a forged endorsement on the back of a United States Treasury check.

In the Carter, opinion issued by the Alabama Court of Criminal Appeals it stated that a federal conviction could be considered under the Habitual Offender Act if there is a State "counterpart" for the crime. The court determined that there was no corresponding state law under which a

person could be charged for possessing a check stolen from the United States mail and therefore a conviction based on such offense could not be used in habitual offender felony sentencing. The opinion went on to say that a conviction under count two could be used in state court since it is equivalent to our offense of possession of a forged instrument.

In the case under consideration now there is no correlative law in Alabama providing for an offense as set out in 26 USC 5861 (d). The Federal statute deals exclusively with compliance of a Federal act and as such the Federal government has exclusive jurisdiction of this offense. A person could not be charged and lawfully convicted in the Alabama state courts for failing to register a firearm in the National Firearms Registration and Transfer Record.

Therefore, the Federal case cannot properly be used as a felony conviction for the purpose of the habitual offender act. Using the Federal conviction as such invalidates the sentencing hearing and violates the appellant's due process rights under the Fifth Amendment to the Constitution of the United States. The Alabama Court of Criminal Appeals stated in their opinion that the proper objection was not made at the time of the sentencing hearing and therefor they would affirm. At the hearing the defense counsel objected on the basis that the proper predicate had not been laid for the introduction of this conviction, which was exactly the case. The State had failed to properly show that the Federal conviction would have also been a felony in Alabama, thus

failing to lay the foundation for compliance with Rule 6 (b)(3)(iv) of the Alabama Rules of Criminal Procedure, Temporary Rules. In dealing with a sentence as harsh as life without parole it is compulsory that all aspects of the trial and sentencing are strictly complied with. To do otherwise would make a mockery of our judicial system and effectively undermine the right of due process guaranteed under the Fifth and Fourteenth Amendments to the Constitution.

CONCLUSION

In conclusion, the Petitioner, Chris Allen Montgomery, respectfully submits that the decision of the Alabama Court of Criminal Appeals and the Supreme Court of Alabama in this case presents conflicts with the prior decisions and opinions of this Honorable Court on numerous different points of constitutional law. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decision of the Courts of Alabama and on such review will reverse the decision of the Alabama court and hold that §13A-5-9, Code of Alabama 1975, is in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States and that the Petitioner's due process rights under the Fifth and Fourteenth Amendments of the Constitution were effectively destroyed.

Respectfully submitted,

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Attorney for Petitioner

Virginia C. Vinson
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed to the attorneys for the Respondent, certified mail, this the 30 day of April, 1984, and addressed as follows:

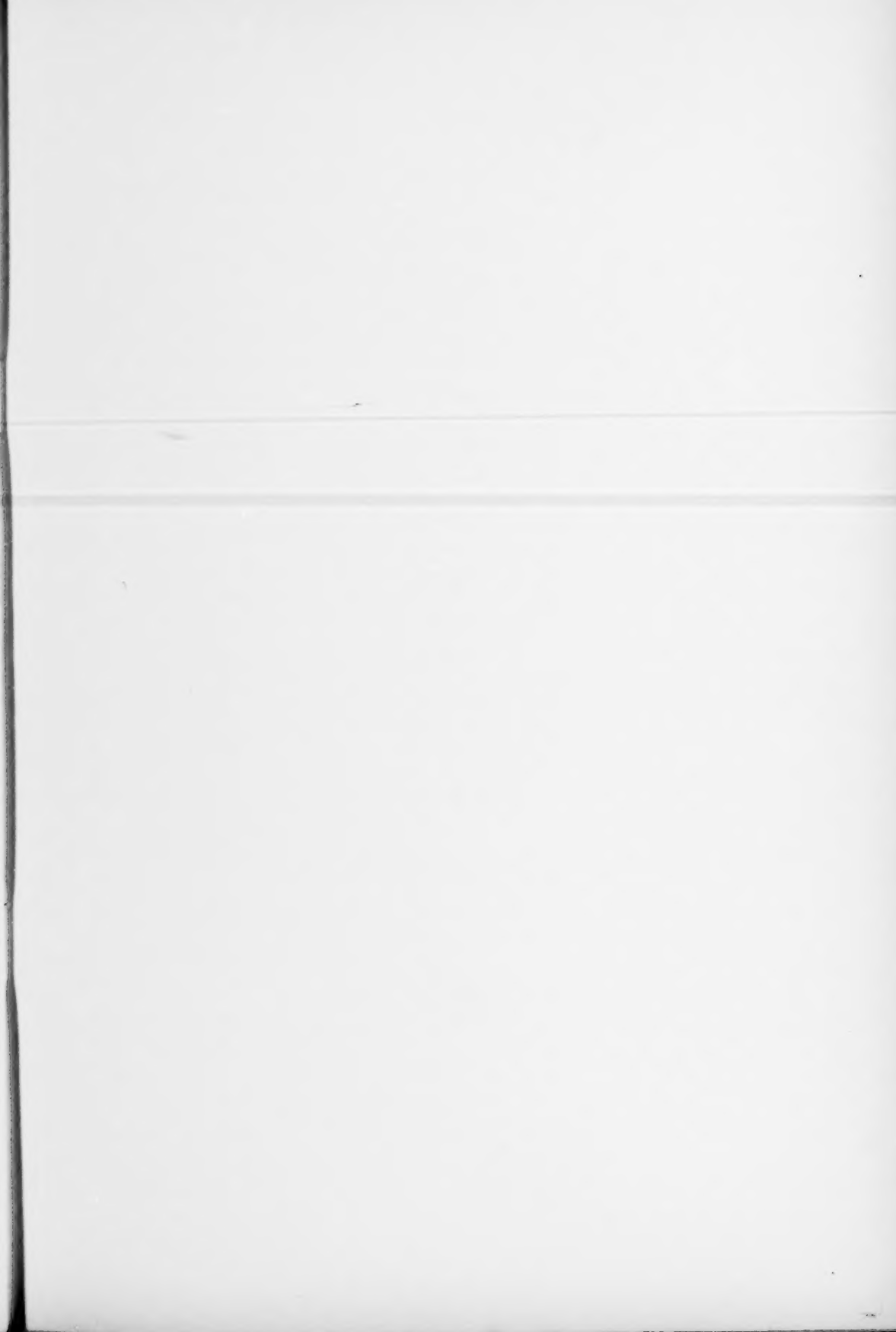
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APPENDIX

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APPEALS OF ALABAMA

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APPENDIX "A"

NOV 29 1983

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1983-84

6 Div. 211

Chris Allen Montgomery

Michael Sanderson

Albert William Pugh

v.

State

Appeal from Cullman Circuit Court

HARRIS, JUDGE.

On April 1, 1983, the Cullman County Grand Jury twice indicted Chris Allen Montgomery, Michael Sanderson and Albert William Pugh for the offense of robbery first degree. The charges were based on a single transaction and consisted of one indictment alleging the robbery of Donald Steele and one indictment alleging the robbery of Truman Waters.

The District Attorney moved to consolidate all indictments and all defendants for purposes of trial, and defendant Pugh moved to sever his case from those of Montgomery and Sanderson. The State's motion to consolidate was granted by the court, and Pugh's motion to sever was denied.

On May 10, 1983, the jury returned verdicts of guilty of robbery in the first degree, as charged in the indictment, for

each of the three defendants. Each was adjudged guilty and each received a sentence, pursuant to the Habitual Felony Offender Statute, of life without parole on both convictions. Each defendant appeals from his sentencing and the cases remain consolidated for purposes of this appeal.

On February 10, 1983, Truman Waters was conversing with Donald Steele at Steele's Grocery Store in the Jones Chapel Community in Cullman County, Alabama, when at about 2:50 p.m., three men entered the store. The men, positively identified at trial as the defendants, Montgomery, Sanderson and Pugh, each held out a pistol and announced, "This is a stick-up." Montgomery held a large, western-style revolver, Sanderson a smaller revolver and Pugh an automatic pistol.

While Montgomery held his gun on the victims, Sanderson removed a total of thirteen firearms, including rifles, shotguns and pistols from the wall behind the cash register and from a floor rack. Pugh took \$580.00 from Steele's wallet, and one of the three men took \$271.00 from Water's billfold and cleaned out the cash register, taking currency, change and checks.

Before the robbers left they bound Steele and Waters with gray duct tape, leaving them on the floor. Steele, however, managed to get to his feet in time to observe a red Ford pickup truck leaving the store's parking area. He was also able to hobble to the telephone and call the sherriff's office, reporting the robbery and giving the officer a description of the vehicle and the direction in which it was headed.

Within minutes after Steele's call Deputy Hobson spotted the truck and gave chase. Eventually, several police cars converged on the truck forcing it into a driveway. When thus cornered, Pugh jumped from the driver's side of the truck and ran, firing on the police officers as he fled.

Three of the officers pursued Pugh, and, after an exchange of gunfire, apprehended him. A subsequent search of Pugh's clothing yielded \$769.00 in currency, three checks made payable to Steels's Grocery, and gray duct tape.

During the chase and capture of Pugh, Sanderson and Montgomery were quietly taken from the truck into the custody of the police officers. Two pistols were found in the seat of the truck, and thirteen firearms were recovered from the bed and the cab.

The three suspects were returned to the store where they were identified by both Steele and Waters as the men who had robbed them half an hour earlier.

It is settled law in Alabama that prompt on-the-scene confrontation and identification of suspects are consistent with good police work and not a denial of due process. Cornelius v. State, 49 Ala.App. 417, 272 So.2d 623, (Ala.Crim.App. 1973), citing Bates v. United States, 405 F.2d 1104 (3d Cir. 1969). As emphasized by the Cornelius, supra, court, the action of police in returning suspects to the vicinity of the crime for immediate identification encourages accuracy, since the witness's memory is fresh, and allows for release of innocent suspects so that police are able to pursue the true culprits as

soon as possible. In Cornelius, supra, as in this case, there had been a robbery and the suspects were returned to the scene half an hour later.

Appellant Albert William Pugh raises two issues on appeal. First, he contends that the trial court committed reversible error when it granted the State's motion for consolidation of the cases and defendants. In this vein, appellant argues that: (1) he was so prejudiced by this joinder of cases that a fair trial could not be had, (2) his request of immediate trial opposed his co-defendant's request for delays, (3) he was not aware of his co-defendant's intentions vel non of testifying at trial, and (4) the rules pertaining to joinder and consolidation are unconstitutionally vague and indefinite.

In upholding the constitutionality of A.R.Crim.P.Temp. 15, this court, in Holseback v. State, (Ms. 7 Div. 156, Nov. 1, 1983) ___So.2d___ (Ala.Crim.App. 1983) held that joinder and consolidation of defendants and indictments are procedural, and as such, do not generally affect the substantive rights of the parties. The court, in Holseback, supra, set out a test for when a severance should be granted on the grounds of prejudice to the defendants. The test is: "whether under all the circumstances as a practical matter it is within the capacity of the jurors to follow the court's instructions and to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts." Holseback, supra. In addition, the court observed

that the trial judge must, of necessity, weigh the prejudice attendant to a joint trial against the interests of judicial economy, and that an appellate court should not disturb the trial court's ruling absent a showing that the lower court abused its discretion.

The cases against defendants Pugh, Montgomery and Sanderson present a paradigmatic case for consolidation of trials under Rule 15.4, *supra*. Paragraph "(a)" of that rule sets out the following three alternative circumstances under which joinder of defendants in one indictment would be proper:

(1) if they are alleged to have participated in the same act or transaction; or

(11) when the several offenses are a part of a common conspiracy, scheme, or plan; or

(iii) when the several offenses are otherwise so closely connected that it would be difficult to separate the proof of one from the proof of the other.

The cases of Pugh, Montgomery and Sanderson qualified for joinder under all three tests since they were alleged to have participated jointly in a single transaction involving a robbery of two persons.

Pugh argues that the consolidation of defendants resulted in denial to him of his constitutional right to a speedy trial. There is, however, nothing in the record to indicate that either delay or continuance of trial occurred, and trial commenced less than ninety days after the robbery.

In Baker v. Wingo, 407 U.S. 514 (1972) the Supreme Court identified four criteria for consideration in speedy trial questions. They are: (1) length of delay

(2) reason for delay, (3) defendant's assertion of his right, and (4) prejudice to defendant. In Barker, supra, the Court held that where defendant was not seriously prejudiced by more than five years delay between arrest and trial that his right to a speedy trial was not violated. Pugh has not shown that he was prejudiced by the three month interval between arrest and trial. See, also Diamond v. State, 268 So.2d 850 (1972); Sellers v. State, 263 So.2d 156 (1972); Schillaci v. State, 347 So.2d 552 (Crim.App.)

Appellant complains that there were inadequate discovery procedures to allow him advance notice of whether his co-defendants intended to testify. The state was not in a position to inform Pugh of the intentions of his co-defendants.

Pugh's counsel, however, was informed at the motion hearing that the State had no statement of any defendant to introduce at trial, no statement was introduced and no defendant testified.

Pugh has not shown that he was in any way prejudiced by the joinder of defendants for purposes of trial, or that the trial court abused its discretion in granting the State's motion to consolidate. Therefore, under Holseback, supra, the trial court's ruling on the matter must be upheld.

The second issue Pugh raises is whether the trial court erred in admitting evidence, in the form of certified copies of trial docket sheets, of three prior felony convictions. It is well established that such records are sufficient proof of prior felonies in an habitual offender context.

E.G., Gilbert v. State, 410 So.2d 473
(Ala.Crim.App. 1982); Thomas v. State,
395 So.2d 1105 (Ala.Crim.App. 1981).

Pugh argues that such evidence was not adequate proof that he acted knowingly and voluntarily in pleading guilty in the prior cases since it did not demonstrate that he was represented by counsel. Whether or not such was the case this contention has no merit, since Pugh admitted at his sentence hearing both the convictions and the fact that he was represented by counsel. Gilbert v. State, 410 So.2d 473 (Ala.Crim. App. 1982).

Appellant Montgomery raises three issues on appeal. First, appellant contends that the sentence of life imprisonment without parole mandated by Alabama's Habitual Felony Offender Statute, § 13A-5-9, Code of Alabama 1975, is a violation

of his rights under the Eighth Amendment of the Constitution of the United States. The constitutionality of Alabama's Habitual Felony Offender Statute has been affirmed on numerous occasions by this court, most recently in Weaver v. State, (Aug. 16, 1983, aff'd) _____ So.2d _____. In this case appellant was a participant in an armed robbery, which is precisely the type of violent crime the statute is primarily designed to deter. Hence, the Habitual Felony Offender Statute is constitutional as applied to appellant.

Montgomery next contends that a prior federal conviction was erroneously used to enhance his punishment under the Habitual Felony Offender Statute. It is settled law that the trial court will not be placed

in error on appeal for grounds not specified during the sentence hearing. Smith v. State, 409 So.2d 455 (Ala.Crim.App. 1981); Slinker v. State, 344 So.2d 1264 (Ala.Crim.App. 1977); Rogers v. State, 302 So.2d 547 (Ala.Crim.App. 1974). Here, appellant raises different grounds on appeal from those raised during the sentence hearing, and there being no proper objection at the trial level, the sentencing must be affirmed.

Montgomery contends lastly that a remark made by the district attorney during the course of the trial should have resulted in a mistrial, on a motion of appellant's counsel. The remark complained of is as follows: "Mr. Harris: Yes, sir. I think that is the procedure that the courts have said is the best procedure for identification is what we have just been over during voir dire." The witness had testified on

voir dire concerning a "show up" of the three defendants , but nothing was said in front of the jury to inform them of what "procedure" the prosecutor was referring to. Defense counsel objected and moved for a mistrial which was denied.

It is axiomatic that the grant or denial of a motion for mistrial is a matter within the sound discretion of the trial court which will only be disturbed upon a showing of manifest abuse. Durden v. State, 394 So.2d 976, cert. denied, 394 So.2d 977 (ala. 1981); Shadle v. State, 194 So.2d 538 (1967); Ala. Code §12-16-233 (1975). We find no such abuse here.

Appellant Sanderson also raises three issues on appeal. Appellant first contends that the trial court erred in admitting twelve evidence tags over the objection

that the best evidence rule required admission of the guns as best evidence. The tags in question had been attached to twelve stolen weapons which form part of the basis of the indictments against appellant. The weapons themselves were not introduced. Appellant complains that the guns, and not the evidence tags, were the best evidence.

The best evidence rule is defined in C. Gamble, McElroy's Alabama Evidence, §212.01 (3d ed. 1977) as follows:

" When a party wishes to prove the term of a writing, the original itself must be introduced into evidence if available. The original is said to be the best evidence of its terms and, consequently, is to be desired above such secondary evidence as a copy of oral testimony. A witness,

therefore, cannot testify to the terms of writing unless it is shown to be unavailable for some reason other than his own fault."

As is apparent from this definition, the best evidence rule has no application to physical objects, but rather is pertinent only to documentary evidence. Dunaway v. State, 278 So.2d 198, 278 So.2d 200 (Ala.Crim.App. 1973); Watercutter v. State, 108 So. 870 (1926). The court, in Bell v. State, 364 So.2d 420, cert. denied, 364 So.2d 424 (Ala. 1978), observed that chattels bearing an inscription could fall within the best evidence rule; but that Alabama cases have not so held. Rather, the Bell court reiterated that in Alabama the best evidence rule does not include chattels. Appellant's contention is, therefore, without merit.

The second issue raised by Sanderson on appeal is whether the trial court committed reversible error in allowing witness Truman Waters to remain in the courtroom during the cross-examination of witness Donald Steele.

Steele was the first witness called by the state and when the prosecution reached the matter of identification, the jury was excused on motion of defense's counsel and counsel requested that Waters be excused for the duration of the voir dire examination, stating, " I don't object to him being in the courtroom during the actual testimony of the case. . . ." After the conclusion of the voir dire examination and the return of the jury to the courtroom, and Steele's subsequent testimony concerning the robbery and the identification of the robbers, defendant's

counsel requested that Mr. Waters be excluded from hearing the cross-examination of Steele, "because he has not been through a voir dire hearing of this matter . . . on the identification."

The enforcement of the rule of exclusion of witnesses is a matter within the sound discretion of the trial court. Chatman v. State, 380 So.2d 351 (Ala.Crim. App. 1980); Stone v. State, 318 So.2d 359 (1975); Gamble, McElroy's Alabama Evidence, §286.01 (3d ed. 1977). Furthermore, the decision as to whether Waters would be allowed to testify, after having heard earlier evidence is normally not open to review. Averitte v. State, 384 So.2d 1245 (Ala. Crim.App. 1980); Stewart v. State, 275 So. 2d 360 (Crim.App. 1973).

We are of the opinion that the court did not abuse its discretion in this matter.

The third issue appellant raises is whether the court erred in not ordering a new trial based upon certain remarks of the prosecutor during closing arguments. The prosecutor's statement asked the jurors to put themselves in the place of the victim. When defense counsel objected, the court immediately gave curative instruction to the jury regarding the remark.

A motion for mistrial implies a miscarriage of justice and is such a serious matter that it should be granted only where there is a fundamental error in trial which would vitiate the result. Floyd v. State, 412 So.2d 826 (Ala.Crim.App. 1981) Stennett v. State, 340 So.2d 67 (Ala.Crim.App. 1976) Ala. Code, §2-16-233 (1975). In Borden v. State, 337 So.2d 1388 (Ala.Crim.App. 1976), the court held that when

a trial judge sustained an objection and properly instructed the jury to disregard the matter that such action was not erroneous unless the matter was of such a nature that it created ineradicable bias or prejudice. Furthermore, it is a basic premise that when prejudicial remarks have been made the trial judge is in a better position than is an appellate court to determine whether the remarks were so prejudicial as to be ineradicable. Favor v. State, 389 So.2d 556 (Ala.Crim.App. 1980); Chambers v. State, 382 So.2d 632, cert. denied, 382 So.2d 636 (Ala. 1980); McAllister v. State, 214 So.2d 862 (Ala. 1968).

The trial court acted properly in giving immediate instructions to the jury regarding the prosecutor's remarks and we

find no ineradicable prejudice to appellant.

We have carefully searched the record for errors injuriously affecting the substantial rights of appellants Pugh, Montgomery and Sanderson, and have found none. The judgment of conviction is affirmed in each case.

AFFIRMED

All the Judges concur.

The Alabama Court of Criminal Appeals
Montgomery, Alabama

6th Div. 211

Cullman Circuit Court

Chris Allen Montgomery
Michael Sanderson and
William Albert Pugh,

Appellants

vs.

The State,

Appellee

Dear Sir: This is to advise you that on
January 10, 1984, the Court of Criminal
Appeals announced decision of application
for rehearing overruled - no opinion - in
the above stated cause.

Yours truly,

Mollie Jordon, Clerk

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

P. O. BOX 351

MONTGOMERY 36101

March 16, 1984

JOHN O. HARRIS
Presiding Judge

MOLLIE JORDON
Clerk

JOHN C. TYSON, III

JOHN P. DECARLO

JOHN G. BOOKOUT

WILLIAM M. BOWEN, JR.

Judges

Honorable Charles M. Purvis
Attorney at Law
617 Frank Nelson Building
Birmingham, Alabama 35203

Dear Mr. Purvis:

Re: 6 Div. 211, Chris Allen Montgomery
v. State

The Court of Criminal Appeals has today granted a stay of sixty (60) days from March 2, 1984, to allow filing of a petition for writ of certiorari in the United States Supreme Court. This stay will remain in

effect, until action is taken on the petition, and if petition is granted, until a decision is rendered by the United States Supreme Court.

The certificate of final judgment has been recalled from the lower court pending determination by the United States Supreme Court, but the certificate will be reissued upon the expiration of the sixty-day stay unless this Court is furnished with proof of the filing of said petition in the United States Supreme Court. SEE RULE 20, RULES OF THE SUPREME COURT OF THE UNITED STATES.

Very truly yours,

/s/ Mollie Jordon
Clerk

cc: Clerk, Circuit Court of Cullman County
Office of Attorney General
File

APPENDIX "B"

MAILING ADDRESS: Telephone: 261-4609

P.O. Box 157
Montgomery, Alabama 36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 83-440

EX PARTE: Chris Allen Montgomery
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS
(Re: Chris Allen Montgomery vs. State
Appellant Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk-Register granted additional time to file clerk's record on appeal to and including

_____ Appell _____ granted 7 additional days to file brief to an including

_____Appellant(s) granted 7 additional days
to file brief to and including

_____Record on Appeal filed

_____Appendix Filed

_____Submitted on Briefs

xxx _____Petition for Writ of Certiorari denied
No opinion. Adams J. - Torbert, CJ,
Faulkner, Almon and Embry, JJ., concur.

_____Application for rehearing overruled.
No opinion. No opinion written on
rehearing.

_____Permission to file amicus curiae briefs
granted.

_____ /s/ Robert G. Esdale, Clerk
Supreme Court of Alabama

March 2, 1984

bsa

APPENDIX "C"

a) United States Constitution - Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life, limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

b) United States Constitution - Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment.

c) United States Constitution - Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "D"

Code of Alabama 1975:

§ 13A-5-9. Habitual Felony Offenders -
Additional penalties.

* * * * *

(b) In all cases when it is shown that a criminal defendant has been previously convicted of any two felonies and after such convictions has committed another felony, he must be punished as follows:

- (1) On conviction of a Class C felony, he must be punished for a Class A felony.
- (2) On conviction of a Class B felony, he must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years;
- (3) On conviction of a Class A felony, he must be punished by imprisonment for life or for any term of not less than 99 years.

(c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after

such convictions has committed another felony, he must be punished as follows:

- (1) On conviction of a Class A felony, he must be punished by imprisonment for life or any term not more than 99 years but not less than 15 years;
- (2) On conviction of a Class B felony, he must be punished for life in the penitentiary;
- (3) On conviction of a Class A felony he must be punished by imprisonment for life without parole.

* * * * *

Alabama Rules of Criminal Procedure,
Temporary Rules:

Rule 6 (b)(3)(iv)

(iv) Any conviction in any jurisdiction, including Alabama, shall be considered and determined to be a felony conviction if the conduct made the basis of that conviction constitutes a felony under Act 607, § 130(4) , Acts of Alabama 1977, p. 812 (§ 13A-1-2 (4), Alabama Crimi-

nal Code), or would have constituted a felony under that section had the conduct taken place in Alabama on or after January 1, 1980.

CERTIFICATE OF SERVICE

I, Arthur J. Hanes, Jr., a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Chris Allen Montgomery, the Petitioner, do hereby certify that on this 30th day of April, 1984, I did serve the requisite number of copies of the foregoing on the Attorney General of the United States of Alabama, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

Honorable Charles Graddick
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

Arthur J. Hanes, Jr.
Arthur J. Hanes, Jr.
Attorney for Petitioner
933 Frank Nelson Building
Birmingham, Alabama 35203
(205) 324-9536



Office - Supreme Court, U.S.

FILED

SEP 21 1984

ALEXANDER L. STEVENS
CLERK

3

NO. 83-1778

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHRIS ALLEN MONTGOMERY,
PETITIONER,

VS.

STATE OF ALABAMA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
OF ALABAMA

BRIEF FOR RESPONDENT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

THOMAS R. ALLISON
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

BEST AVAILABLE COPY

23 pp

(i)

QUESTION PRESENTED

1. Whether petitioner may raise for the first time in this court a federal question that was neither raised nor addressed by the courts below.
2. Whether the state appellate court's opinion regarding the state's 'habitual offender law and the Eighth Amendment is in conflict with the rulings of this Court or the United States Courts of Appeals.

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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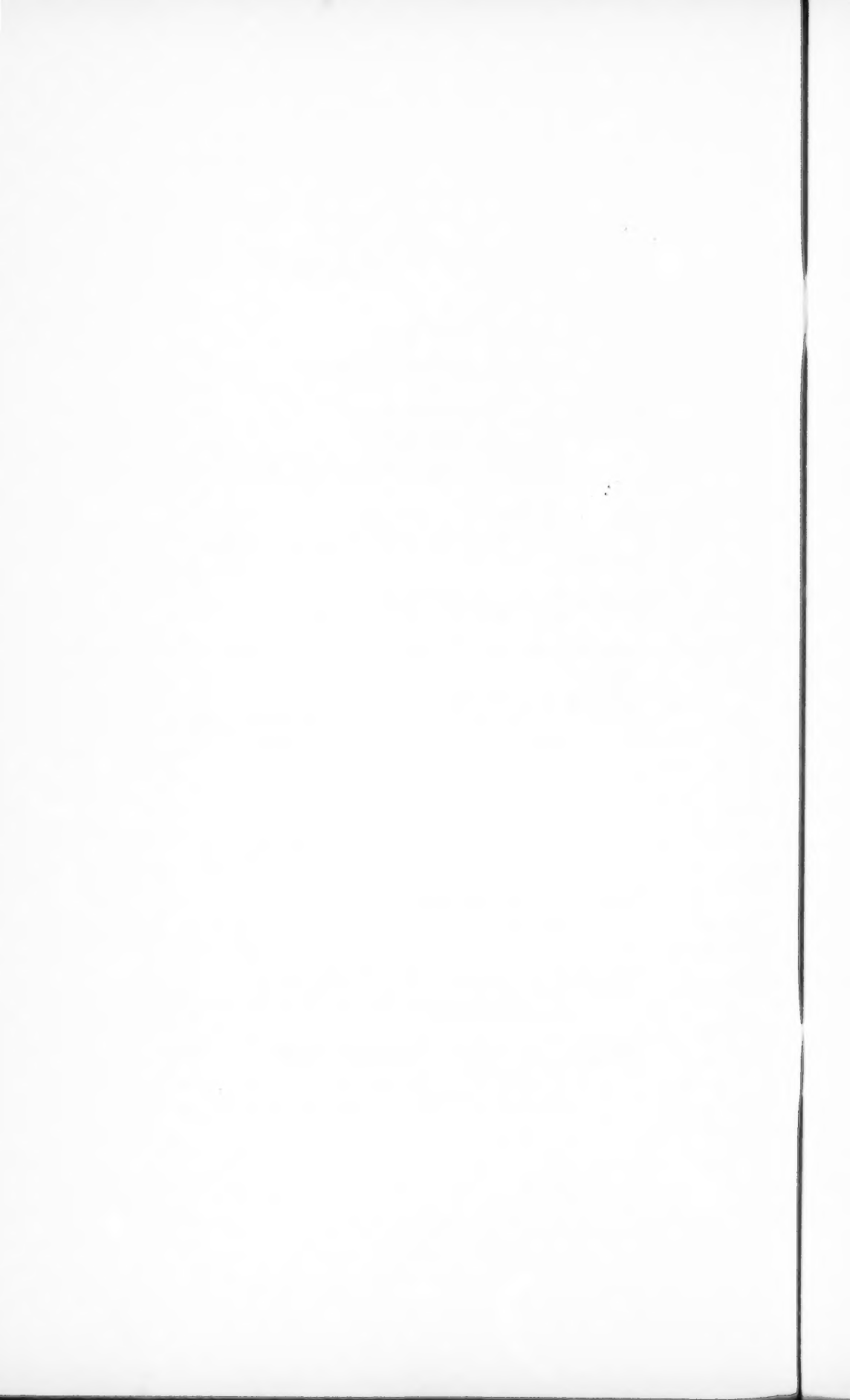
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OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is reported as:

Montgomery v. State,
446 So.2d 697
(Ala.Cr.App. 1983)

The order of the Alabama Supreme Court is reported as:

Montgomery v. State,
446 So.2d 697 (Ala. 1984)

JURISDICTION

Respondent is satisfied with petitioner's jurisdictional statement except that the decision of the Alabama Supreme Court denying the writ was rendered on March 2, 1984 (not 1983).

STATEMENT OF THE CASE

Respondent is satisfied with the petitioner's statement with the exception of the following observations and corrections:

Montgomery's first "Question Presented" concerns the use of a prior federal felony conviction to enhance his punishment for the robbery conviction appealed from. In his petition before this court, he argues that he was denied his right to Due Process of Law under the Constitution. We observe that this argument was not presented to the state courts below. Neither did any state court rule or opine on any such Constitutional issue. Although Montgomery admits as much in his "Statement of the Case and Facts," respondents will elaborate further on this problem in the Argument and Appendix sections of this brief.

Petitioner is seeking a review of a conviction for Robbery in the First Degree. As stated in the opinion of the state court of criminal appeals (pages 3-5 of the appendix to petitioner's brief), Montgomery and his two accomplices pointed pistols (Montgomery's was a "large, western-style revolver") at two victims during a "stick-up," bound them with tape, and robbed them of money and merchandise. During the police chase a few minutes later, accomplice Pugh exchanged gunfire with the authorities. In view of all of this, respondent disagrees with petitioner's conclusion that "there was no violence" (as asserted by petitioner at page 6 of his brief).

ARGUMENT

The petition should be denied for the following reasons:

I.

Montgomery's first asserted reason for the writ concerns the trial court's use of a prior federal court felony conviction to enhance his sentence under the habitual offender law. He complains that the sentencing court, in so noticing the prior felony, deprived him of "his due process rights under the Fifth Amendment to the Constitution. . ."

[Petitioner's argument on this issue appears as Section II of his Argument (pg. 15 of his brief).] This is the first time that Montgomery has complained about that felony on federal Constitu-tional grounds.

He did, in fact, raise questions about the propriety of the federal firearms conviction in the Court of

Criminal Appeals and in his petition for a writ of certiorari in the Alabama Supreme Court.

1. The issue presented to the state intermediate appellate court is recited in Appendix A to this brief. The entire argument on the same issue (drawn from his brief in that court) is quoted in Appendix B to this brief. The court's response to the argument appears in the opinion at pages 14-15 of Appendix A to petitioner's brief.

2. The issue raised in the state supreme court is quoted in Appendix C to this brief.

In every case, Montgomery based his argument on Rule 6(b)(3)(iv) of the Alabama Rules of Criminal Procedure and upon the opinion in Carter v. State, 420 So.2d 292 (Ala.Cr.App. 1982). Even in his argument in this court (see pp. 15-18 of his brief), petitioner grounds his

complaint upon state law. He has added the Fifth Amendment due process argument in an effort to justify Supreme Court review. This he cannot do. See Rules 17 and 21(h) of the Rules of the Supreme Court, 1980.

II.

Montgomery's second "Question Presented" (but argued first in his brief), is whether the Alabama Habitual Felony Offender Act (§13A-5-9 of the Code of Alabama, 1975) complies with this court's ruling in Solem v. Helm, ___ U.S. ___, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

Petitioner's brief was prepared prior to the publication of the opinion in Seritt v. Alabama, No. 82-7127 (11th Cir., May 3, 1984). The factual legal issues involved in that case are strikingly similar to those present here.

Seritt was a habeas corpus challenge to the Constitutionality (under the Eighth Amendment) of a sentence of life without parole pursuant to Alabama's Habitual Felony Offender Act.

As here, Seritt was convicted of first-degree robbery. He was sentenced to life without parole based upon evidence of four prior felony convictions, all for violations of the state's controlled substances act. Seritt, at Ms. Op. 2919. As here, Seritt grounded his right to relief upon Solem v. Helm, supra. The Eleventh Circuit responded as follows:

Seritt's reliance on Solem v. Helm, however, to support his assertion that his sentence is unconstitutionally disproportionate is misplaced.

The issued raised in Solem v. Helm, was the extremely narrow one of "whether the Eighth Amendment proscribes a life sentence without possibility of parole of a seventh nonviolent felony." Id. at ___, 103 S.Ct.

at 3004, 77 L.Ed.2d at 642.
[Emphasis added by the Seritt
court]

Solem is sharply distinguishable from this case. Since Seritt's most recent conviction was for first-degree robbery, a crime of violence, and the defendant in Solem was convicted of uttering a "no account" check for \$100, a nonviolent offense, the Solem case is factually different and therefore inapposite. Thus, in the face of different factual settings, Seritt's reliance on Solem is unavailing.

Seritt, at Ms. Op. 2922-2923

The Eleventh Circuit proceeded to examine the operation of the Alabama Habitual Offender Act in light of the criteria set out in Solem (at U.S. ___, 103 S.Ct. 3010, 77 L.Ed.2d 650) and in a factual setting virtually indistinguishable from that in the instant case. See, Seritt, at Ms. Op. 2923-2928. The court noted that:

Except for treason, it is apparent that Alabama has reserved as Class A felony classification only the most serious

of offenses and those involving the risk that a human life will be taken. . . . Furthermore, section 13A-5-9(c)(3) guarantees that no criminal will receive the sentence of life imprisonment without parole, as a habitual offender, unless he has been convicted of three prior felonies and then commits a life-endangering offense.

Id., Ms. Op. 2924

After this painstaking analysis, the Eleventh Circuit panel concluded that, under the facts there presented, "the eighth amendment does not proscribe a sentence of life imprisonment without parole for a three-times convicted felon who thereafter commits a violent, life-threatening felony." Id., at Ms. Op. 2928 (last paragraph)

CONCLUSION

Petitioner having presented no grounds for the grant of the writ sought, respondent respectfully submits that the petition should be denied.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

THOMAS R. ALLISON
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

CERTIFICATE OF SERVICE

I hereby certify that on this
the _____ day of September, 1984, I served
three copies of the foregoing Brief and
Argument in Opposition to the Petition
for Writ of Certiorari on the attorneys
for petitioner by placing same in the
United States Mail, postage prepaid and
properly addressed as follows:

Arthur J. Hanes, Jr.
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Virginia A. Vinson
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App-1

APPENDIX



APPENDIX A

Page 3 of the Appellant's (Petitioner's)
brief in the Court of Criminal
Appeals of Alabama:

ISSUES PRESENTED FOR REVIEW

1. Whether the mandatory sentence of
life imprisonment without parole provided
for in Code of Alabama, 1975,

§13A-5-9(c)(3) is a violation of the
Eighth Amendment of the Constitution.

Rummell v. Estelle, 445 U.S. 263, 100
S.Ct. 1133, 63 L.Ed.2d 352.

Solem v. Helm, 33 Cr.L. 3220, June 28,
1983.

Code of Alabama, 1975, §13A-5-9(c)(3).

2. Whether the prior Federal conviction
of the accused was erroneously used to
enhance his punishment under the habitual
offender act.

Carter v. State, 420 So.2d 292
(Ala.Cr.App. 1982).

26 USC 5861 (d)

App-3

Rule 6 (b)(3)(iv), Alabama Rules of
Criminal Procedure - Temporary Rules

3. Whether a remark made by the
prosecutor during the course of the trial
which incorrectly misstated the law of
Alabama was erroneous.

House v. State, 61 So.2d 457, 36 Ala.App.
550, cert. denied, 61 So.2d 458, 258 Ala.
196 (1952).

Wade v. State, 381 So.2d 1057
(Ala.Cr.App. 1980).

APPENDIX B

Section II of Appellant's (Petitioner's)
Argument in the Court of Criminal
Appeals of Alabama

Mr. Montgomery's second contention to this Court is that error resulted when the trial court used a prior Federal conviction to enhance his punishment under the habitual offender act.

The Federal conviction made the basis of this argument is a violation of 26 USC 5861 (d):

"It shall be unlawful for any person to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."

Mr. Montgomery was convicted for possession of a 20 gauge single barrel shotgun which had not been so registered.

Rule 6 (b) (3) (iv) of the Alabama Rules of Criminal Procedure - Temporary Rules provides that:

"Any conviction in any jurisdiction including Alabama, shall be considered and determined to be a felony conviction if the conduct made the basis of that conviction constitutes a felony under Act 607, §130 (4), Acts of Alabama, 1977, p. 812 (§13A-1-2(4), Alabama Criminal Code, or would have constituted a felony under that section had the conduct taken place in Alabama on or after January 1, 1980."

It is the proposition of the appellant that the possession of a firearm which has not been registered in the National Firearms Registration and Transfer Record does not constitute a crime under Alabama law and therefore cannot be considered a prior felony for sentencing purposes.

In Carter v. State, 420 So.2d 292 (Ala.Cr.App. 1982), the defendant was sentenced under the habitual offender act

and one of the prior convictions presented to the sentencing court was a conviction under a two count Federal indictment charging in one count the possession of a check stolen out of the United States mail and in Count 2 of unlawfully uttering and publishing a forged endorsement on the back of a United States Treasury check.

In the opinion issued by this court it stated that a federal conviction could be considered under the Habitual Offender Act if there is a State "counterpart" for the crime. This court determined that there was no corresponding state law under which a person could be charged for possessing a check stolen from the United States mail and therefore a conviction based on such offense could not be used in habitual felony sentencing. The opinion went on to say that a conviction under count two could be used in state

court since it is equivalent to our offense of possession of a forged instrument.

In the case under consideration now there is no correlative law in Alabama providing for an offense as set out in 26 USC 5861(d), the Federal statute deals exclusively with compliance of a Federal act as such the Federal government has exclusive jurisdiction of this offense. A person could not be charged and lawfully convicted in the Alabama state courts for failing to register a firearm in the National Firearms Registration and Transfer Record.

Therefore the Federal case cannot properly be used as a felony conviction for the purpose of the habitual offender act. Using the Federal conviction as such invalidates the sentencing hearing and this case should be remanded for new hearing.

APPENDIX C

Excerpt from Appellant's (Petitioner's)
Petition for a Writ of Certiorari
in the Supreme Court of Alabama

Petitioner alleges as grounds for
the issuance of the Writ the following:

* * *

2. The second basis of the
petition is that the decision of the
Court of Criminal Appeals in upholding
the trial court's action's [sic] of
allowing a prior Federal conviction to be
used to enhance punishment under the
Habitual Offender Statute is in conflict
with a prior decision of that court
namely Carter v. State, 420 So.2d 292
(Ala.Cr. App. 1982). The court in
Carter, held that a Federal conviction
could not be used to enhance punishment
under the Habitual Offender Statute if
there is no correlative law in Alabama
providing for such an offense.